

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

TRANSCRIPT OF CIVIL CAUSE FOR MOTION HEARING
BEFORE THE HONORABLE WILLIAM E. SMITH
UNITED STATES DISTRICT COURT JUDGE

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1 (VIA VIDEO CONFERENCE)

2 25 FEBRUARY 2021

3 THE COURT: All right. Welcome everybody. So
4 we're going to go on the record now. This is the
5 matter of CVS vs. Brown. And we're here for a hearing
6 on the motion for a temporary restraining order as well
7 as, I take it, also on the defendant's motion to
8 dismiss or transfer venue. So let's have counsel
9 identify themselves.

10 MR. CUNNINGHAM: Good afternoon, your Honor.
11 It's Glenn Cunningham from Shipman & Goodwin on behalf
12 of CVS Pharmacy, Inc., the plaintiff. I do believe
13 that local counsel, Mr. McNamara, should be joining,
14 but it's okay. I'll be doing the argument today, your
15 Honor.

16 THE COURT: Very good.

17 MR. McDUGALD: Good afternoon, your Honor. I'm
18 Shannon McDougald for the defendant, Mr. Brown. And I
19 think local counsel is on as well as my colleague,
20 Trent Latta.

21 THE COURT: Okay. Very good. Thank you.

22 Okay. Well, I do have your papers, and I
23 reviewed much of what you filed. I can't say I
24 reviewed every single page because I think it went up
25 to about 600 pages when I counted it up. So I will say

1 that I think that it makes the most sense to me at this
2 stage for me to really hear from you on the personal
3 jurisdiction issue and the venue issue. I think
4 there's a serious question of personal jurisdiction and
5 venue, particularly personal jurisdiction, that's
6 raised here. And I'm also concerned about this
7 Washington State statute which plays into -- doesn't
8 play into personal jurisdiction, but it does have a
9 connection to venue as well as to the merits. So I
10 want to hear about that.

11 That's a real -- as far as I'm concerned, that's
12 a very new sort of twist to these cases and is not
13 something that we've had a lot of experience with. In
14 fact, this looks like a statute that only became
15 effective about a year ago -- a little over a year ago.
16 So I'd really like to focus on that. And I think that
17 would be most helpful to me. It's not that I don't
18 want to get into the merits, but, you know, as I look
19 at this, I actually think discussion of the merits may
20 well require an evidentiary hearing because it really
21 comes down to a battle of affidavits. And it's very
22 hard for me to make a really informed and kind of
23 thorough assessment of what should happen here without
24 having those -- the testimony that's in those
25 affidavits subject to cross-examination so that I can

1 really kind of drill down on that. And that's
2 obviously a more involved thing.

3 And if I end up agreeing with the defendant with
4 respect to personal jurisdiction and venue, it seems to
5 me that I should make that decision quickly and get the
6 case transferred to the District of Washington so that
7 -- because any judge that gets the case out in
8 Washington State is going to have the same reaction to
9 the briefing on the merits that I have, and he or she
10 is going to want to have an evidentiary hearing. So I
11 think my -- and I'm happy to have you disagree with me
12 about any of this if you wish to, but I think that my
13 time is best spent doing as expeditious of an
14 evaluation of this jurisdictional and venue issue and
15 getting you a decision on that as quickly as I can.
16 And if it's to keep it, then we go into the merits.
17 And if it's to transfer it, it gives that judge a
18 chance to dig into the merits.

19 That's how I'm looking at this material, but I'm
20 happy to take your views about that. So maybe,
21 Mr. Cunningham, you can go first.

22 MR. CUNNINGHAM: Thank you very much, your
23 Honor. And I appreciate you guiding us and giving us
24 some initial thoughts on where to focus, and we'll do
25 that.

1 I think, preliminarily, you're absolutely right,
2 you're hearing two very different stories about the
3 facts of this case. And the issue before us today is
4 the TRO which would, I think, get us to the preliminary
5 injunction hearing where we can have a full vetting of
6 the information; we can have live witnesses, we can
7 cross-examine, so that the Court hears the entire story
8 and could assess that story.

9 So from our perspective, your Honor, that's
10 really what we're interested in today is making sure
11 that we have protection from now to whatever the next
12 proceeding is and wherever that is. And I do think
13 that that proceeding belongs here with your Honor in
14 Rhode Island. Maybe I'll just start with the
15 Washington statute because, frankly, having reviewed
16 it, I think we can dispense with that very quickly.

17 You know, that Washington statute, as your Honor
18 noted, is very new. It's somewhat unique and so
19 there's not going to be a whole lot of case law about
20 that. But we don't think that it applies at all. And
21 there's a number of reasons for that, your Honor.

22 First, this action is governed by Rhode Island
23 law. This is a breach-of-contract action. And of
24 course, the Court sitting in diversity is going to
25 apply the forum state law, Rhode Island, to determine

1 the appropriate choice of law. And the choice-of-law
2 provisions in Rhode Island, your Honor, are very clear;
3 the parties are permitted to agree to the law of a
4 particular jurisdiction. And that comes directly from
5 the Rhode Island Supreme Court. And Rhode Island, just
6 like most jurisdictions who follow the restatement,
7 recognize that those choice-of-law provisions are valid
8 and only under very limiting, rare exceptions, your
9 Honor, would that best choice-of-law provision not
10 apply.

11 And none of those exceptions are here. That
12 would only be under Rhode Island law if the chosen
13 state, Rhode Island, bears no substantial relationship
14 to the parties and there's no other reasonable basis
15 for the parties' choice. And the *Sheer* case, the
16 Supreme Court case in Rhode Island, recognized that we
17 get out of that exception very quickly if one or
18 another situation applies; and that is, if one of the
19 parties is domiciled where choice of law has been
20 chosen or the principal place of business of one of the
21 parties is in the state where the jurisdiction has been
22 chosen.

23 Of course, both of those issues apply here. CVS
24 is both domiciled in Rhode Island, and they have a
25 principal place of business in Rhode Island. So just

1 under straight Rhode Island choice-of-law provisions,
2 your Honor, or rules, your Honor, the choice-of-law
3 provision of Rhode Island, which was selected by the
4 parties in their agreement, certainly should apply.
5 And we think that dispenses with the Washington issue
6 straightaway.

7 But that said, your Honor, there are other
8 reasons why I don't think this Washington statute
9 applies. And there is an initial question, and I don't
10 know how big of a deal it is but we have to raise it,
11 and that is a question of whether or not Mr. Brown is
12 currently domiciled in the State of Washington or not.
13 In preparing for today, we learned --

14 THE COURT: Let me just redirect you, and I do
15 want you to get to that point in a minute, but just
16 since you began with the choice-of-law issue, I think
17 we should zero in on that. And I'm looking at the
18 clause itself which says, "I agree that any claim or
19 dispute I may have against the corporation must be
20 resolved by a court located in the state." I guess
21 this is more of a jurisdictional -- I guess it's the
22 sentence before that. "This agreement shall be
23 governed by and construed in accordance with the laws
24 of the State of Rhode Island." And then it has that
25 following sentence.

1 What I'm wondering about is, does this clause
2 when it's read as a whole, does it apply to an
3 action -- so is it really about actions by Brown
4 against CVS?

5 MR. CUNNINGHAM: No, I think those are two very
6 separate issues, your Honor. As your Honor noted, the
7 second sentence, that's the venue and personal
8 jurisdiction sentence. So jumping ahead to personal
9 jurisdiction just very briefly, Mr. Brown has agreed
10 that Rhode Island has personal jurisdiction of him, at
11 a minimum, because of that very sentence as you pointed
12 out.

13 But if we look at the first sentence, your
14 Honor, what that is telling us is that the parties have
15 agreed that Rhode Island, Rhode Island law, will govern
16 this agreement. That's the point, your Honor. So this
17 Washington statute can't subvert the choice that the
18 parties made to have this agreement, this RCA, governed
19 by Rhode Island law.

20 THE COURT: Okay. So keep going. You were on
21 the issue of where he is living.

22 MR. CUNNINGHAM: Right, your Honor. And again,
23 this may or may not be an issue, but certainly we found
24 out on Tuesday that just prior to resigning from CVS, I
25 believe it was on January 26th, and before we filed the

1 action, Mr. Brown had sent a notice to the CVS payroll
2 HR group notifying them of the change of address for
3 tax purposes and for payroll purposes, and that change
4 of address was to an address down in Scottsdale,
5 Arizona. We did a little checking quickly on publicly
6 available records. It turns out that Mr. Brown does
7 own property in Scottsdale, Arizona, that syncs up with
8 his change request.

9 And we also noted that under publicly available
10 records he has apparently put his residence in Seattle,
11 Washington, up for sale, and there is an offer to
12 purchase that residence in Seattle. So we don't know
13 how long he's there, we don't know how long he's going
14 to be there -- I'm sure Mr. McDougald can enlighten us
15 on that -- but we certainly wanted to bring that to the
16 Court's attention because that may take care of a lot
17 of these issues upfront.

18 Leaving that aside, your Honor, just talking
19 about this Washington statute, even if we were to
20 ignore the parties' choice of law of Rhode Island, the
21 Washington statute is not retroactive. It does not
22 change the parties' agreement specifically. It is not
23 retroactive on its face. And even if it does control
24 this particular case, the agreement doesn't apply by
25 its own terms.

1 The Washington statute, your Honor, specifically
2 excludes from the definition of a noncompete agreement
3 an agreement that was entered into regarding ownership
4 of one of the parties, which is precisely what we have
5 here, your Honor. I just want to get that language in
6 front of me so that we can look at it together.

7 And what the Washington statute says, your
8 Honor -- this is in a definitional section under
9 definition number 4 -- it defines noncompetition
10 covenants, and it specifically says halfway through, "A
11 noncompetition covenant does not include a covenant
12 entered into by a person purchasing or selling the
13 goodwill of a business or otherwise acquiring,
14 disposing of an ownership interest."

15 Well, as you know, your Honor, this agreement
16 was entered into as part of an equity award in CVS.
17 That was part of an ownership interest in CVS. By the
18 express language in the Washington statute, we contend,
19 your Honor, that the agreement is not covered by the
20 Washington statute.

21 Furthermore, even if it is, your Honor, there's
22 nothing in the statute applied to the facts of the case
23 that would invalidate the entire restrictive covenant
24 agreement. There is a section within the statute that
25 says when an agreement is void and unenforceable. None

1 of those provisions apply here so we're outside all of
2 those sections within the void and unenforceable
3 agreement. The only possible provision in here that
4 would apply is dealing with what's called unenforceable
5 provisions where it says a provision, not the entire
6 agreement, but the provision in the noncompetition
7 covenant, signed by an employee or independent
8 contractor who is Washington based -- again, that's
9 still a question -- is void and unenforceable if it
10 requires the employee to adjudicate a noncompetition
11 covenant outside of the state.

12 So when you boil it all down, your Honor, that's
13 the only provision in this statute that may have any
14 applicability to our situation. And that's because of
15 that venue personal jurisdiction sentence you pointed
16 out in Section 19 of the agreement that says that if
17 Mr. Brown has a claim against CVS, he needs to bring
18 that up in Rhode Island.

19 THE COURT: But that's a pretty important
20 provision.

21 MR. CUNNINGHAM: Well, it can be, your Honor.
22 We'll get to personal jurisdiction and to venue, but
23 the point is --

24 THE COURT: Let's zero in on that part of the
25 provision. You know, its plain meaning would suggest

1 that the contract is void by virtue of the
2 choice-of-law provision that you just pointed to,
3 doesn't it?

4 MR. CUNNINGHAM: No, not at all, your Honor.
5 The statute is very specific that all this statute does
6 is it voids out that provision. It specifically says
7 unenforceable provisions. It's not the entire
8 agreement.

9 THE COURT: Read it again.

10 MR. CUNNINGHAM: Certainly, your Honor. It
11 says -- so it's under the heading "Unenforceable
12 Provisions." And it says, "A provision in a
13 noncompetition covenant signed by an employee or
14 independent contractor who is Washington based is void
15 and unenforceable; one, if the covenant requires the
16 employee or independent contractor to adjudicate a
17 noncompetition covenant outside of the state." So it
18 only invalidates, if anything, that second sentence in
19 Section 19 that says that Mr. Brown would have to bring
20 a claim against CVS in Rhode Island.

21 By the way, your Honor, the statute doesn't say
22 that CVS on its own -- let's just presume, for the sake
23 of argument, that that second sentence didn't exist in
24 Section 19. Nothing in the Washington statute says
25 that CVS on its own can't commence an action against a

1 Washington-based employee in Rhode Island or anywhere
2 else. It doesn't prohibit that. It just says you
3 can't force the employee to do so. That's all that's
4 covered. That's why I think when we drill into this,
5 your Honor, it really is an interesting discussion that
6 doesn't really have an impact on this case.

7 THE COURT: Okay. Well, let me just be clear
8 that at a minimum you would concede if it does apply,
9 then it makes the provision in the contract, which we
10 were just referring to a moment ago, the one
11 that -- actually, both sentences of the agreement, it
12 would make both of those sentences unenforceable,
13 wouldn't it?

14 MR. CUNNINGHAM: No, your Honor, I don't agree
15 with that. I think it would, at most, only make -- we
16 would have to strike out, which of course the agreement
17 allows you to do, we would have to strike out the
18 second sentence of Section 19. That's it. That's it.

19 And your Honor, I just have to say, I think it's
20 a very big leap to say that this Washington statute
21 governs this litigation where the Court is sitting in
22 diversity, where we have a Rhode Island choice of law
23 that was relied upon by CVS, where the State of Rhode
24 Island has substantial public policy interests in being
25 able to have its citizens enforce laws and bring

1 actions within the State of Rhode Island and as we --
2 our quick research where these issues have come up --
3 Sixth Circuit has the leading decisions on this -- the
4 Sixth Circuit has said in sort of analogous situations
5 -- actually, with California which has a straight ban
6 on noncompetes, essentially, California can do what it
7 wants to do, but it can't tell Ohio or other states in
8 the Sixth Circuit what they're going to do.

9 And we're faced with that issue here, your
10 Honor. At a certain level it creates a conflict. But
11 I don't believe that Washington can have a super
12 national law that's going to tell us in Rhode Island
13 what we can and can't do, especially when the parties
14 have agreed that Rhode Island law applies.

15 THE COURT: Yes. Well, I mean, it raises a
16 peculiar problem. Now, I apologize, so let's just -- I
17 want to go back over this and make sure I understand
18 your reasoning.

19 So if I were to agree with you that the
20 provision of Washington law that we're talking about,
21 that it only applies to provisions and not to make the
22 entire agreement void, but if I were to agree with
23 that, but it says it makes a provision unenforceable if
24 the covenant requires the employee to adjudicate a
25 noncompetition covenant outside of this state.

1 So you're saying the second sentence of the
2 agreement is the part that would be made unenforceable,
3 but the choice of law would remain in effect. That's
4 your point.

5 MR. CUNNINGHAM: That's correct, your Honor.
6 And just again, because this is such a new statute I
7 think for everyone, we started with the definitional
8 section in the statute that by its express terms takes
9 our situation out of the statute. That's the
10 definition of a noncompetition covenant. Because it
11 says -- it's specifically excluded from the statute --
12 is an agreement where it was entered into with regard
13 to the acquiring or disposing of an ownership interest
14 in a company.

15 THE COURT: I understand your argument there. I
16 would have a question about whether that provision
17 applies to this type of a -- was meant to apply to this
18 type of a situation. Again, I suppose that's another
19 reason why one can say a court in Washington State
20 ought to be answering that question, not a court in
21 Rhode Island. But I understand your argument.

22 MR. CUNNINGHAM: Right. And I suppose CVS's
23 position, your Honor, would be, we shouldn't have to go
24 to Washington to resolve a dispute over a Washington
25 statute when we agreed that Rhode Island law would be

1 applying to this agreement. That was the benefit of
2 the bargain. We gave him a substantial amount of
3 equity; he accepted it. He knew what he was doing;
4 he's a sophisticated guy. And now suddenly, you know,
5 a statute that comes into play after the agreement was
6 entered into is now going to have retroactive effect
7 and send us to Washington? That's certainly not what
8 the parties had expected when this agreement was signed
9 back in 2019.

10 THE COURT: Okay. I think you really ought to
11 get into the personal jurisdiction question because to
12 me that's a much more traditional analysis, and I
13 actually think you've got some issues there.

14 MR. CUNNINGHAM: Okay, your Honor. Thank you.
15 And I'm happy to talk about that.

16 You know, of course, our position is the Court
17 does have personal jurisdiction over the defendant at
18 this stage of the action where we're not having an
19 evidentiary hearing that tested the prima facie test
20 that we're all familiar with. And the First Circuit
21 test there, you know, has three sections to exercise
22 specific personal jurisdiction.

23 The first, of course, is the relatedness test.
24 And these claims, your Honor -- I don't think there's
25 much debate over this -- these claims brought against

1 the defendant relate to Mr. Brown's contacts with Rhode
2 Island. I mean, they arise directly out of an
3 agreement that was entered into between Mr. Brown and a
4 Rhode Island domiciled corporation that has a Rhode
5 Island principal place of business that gave Mr. Brown
6 equity in the Rhode Island principal place of business
7 organization in exchange for the covenants that we now
8 claim he's breaching.

9 And in addition, your Honor, there's a Rhode
10 Island choice-of-law clause and under the *Astro-Med*
11 case, the First Circuit decision, that Rhode Island
12 choice-of-law clause alone is sufficient to satisfy the
13 relatedness prong of the prima facie test, your Honor.
14 You know, that's our position with regard to
15 relatedness. Of course, the second issue is purposeful
16 availment. The test there, essentially, is did the
17 defendant voluntarily take action that made it
18 foreseeable he might be required to defend himself in
19 Rhode Island? And of course, a physical presence is
20 not necessary.

21 I think the answer to that question, your Honor,
22 was it foreseeable that he would have to adjudicate the
23 case in Rhode Island, is unequivocally yes. Again,
24 Mr. Brown is a sophisticated person who has been
25 negotiating contracts for decades. He entered into a

1 direct relationship, a direct contract, with CVS, which
2 is domiciled and has a principal place of business in
3 Rhode Island. He did so knowing many months after CVS
4 had acquired Aetna where the Medicare Advantage program
5 is housed.

6 So he knew that CVS owned Aetna at that point.
7 And he accepted stock in CVS, your Honor, nearly
8 \$100,000 worth of stock in CVS. On top of that, he was
9 selected for a leadership training program -- that's
10 CVS, it's not just Aetna -- where he voluntarily went
11 to Rhode Island for four days to be trained on that.

12 And last, but not least, and this may be the
13 most important point, your Honor, if we go back to that
14 Section 19, he agreed that if he had a claim against
15 CVS, he would bring that in Rhode Island. Any kind of
16 a claim, not just a noncompete claim. If he had a wage
17 and hour claim or some other type of claim, whatever it
18 may be, he agreed he would bring that in Rhode Island.

19 That was the bargain that was struck. He
20 accepted the stock. He accepted the consideration.
21 Therefore, it had to be foreseeable for him that he
22 might have to litigate a case in Rhode Island, your
23 Honor. So again, I don't think there's any question
24 but that the purposeful availment prong has been met.

25 And once again, you know, the law in the circuit

1 is a choice-of-law clause alone is indicative of the
2 fact that someone has purposely availed themselves of
3 jurisdiction in Rhode Island. And so, your Honor, if
4 those two prongs are met, that gets us to the five
5 Gestalt factors. You know, the defendants -- we look
6 first at the defendant's burden in appearing. Again,
7 the most important part of that is he agreed to the
8 personal jurisdiction in Rhode Island.

9 And given certainly all the circumstances that
10 we all live in these days, I don't think the burden of
11 appearing in Rhode Island is any different than
12 appearing in Washington, if that's where he still is.
13 That issue still needs to be resolved.

14 Second, and this is, I think, very important,
15 your Honor, is Rhode Island's interest in adjudicating
16 this dispute. CVS is a Rhode Island company. And CVS
17 gave its stock, ownership in itself, to Mr. Brown. And
18 it expects Mr. Brown to abide by his commitments. And
19 it has the right, because it negotiated for it, to have
20 an action adjudicated in its own State of Rhode Island.
21 Again, CVS is only seeking the benefits of the bargain
22 that it struck with Mr. Brown.

23 THE COURT: Let me interrupt you there because,
24 again, this gets to -- I mean, we kind of go in circles
25 here and it's hard to know which question to take up

1 first, but let's just assume, just for discussion for a
2 moment, that I agree with Mr. McDougald that this
3 Washington law does apply. Then that creates a kind of
4 anomalous situation where I would be -- if I were to
5 accept your arguments, I would be using a provision
6 that, for purposes of analyzing purposeful availment,
7 that Washington law says should not be applicable, that
8 is, the choice-of-law aspect of the agreement.

9 So it seems to me that I have to answer that
10 Washington law question. If I answer it, that it does
11 apply, if I don't accept your argument that this equity
12 provision provides an exception to it and I say it does
13 apply, then it seems to me that the choice-of-law
14 aspect of the agreement has to be disregarded for
15 assessing personal availment. And if that is
16 disregarded, then what we're left with, and if I'm
17 hearing your arguments correctly, are essentially the
18 fact that, you know, he worked for a Rhode Island
19 corporation, he got paid by this Rhode Island
20 corporation, he accepted the money from the Rhode
21 Island corporation, and he came to Rhode Island for a
22 training session, one trip. That seems like a pretty
23 thin read when all of his work -- when the actual work
24 that he was doing was all in the Pacific Northwest.
25 The work that he was doing wasn't, you know -- it

1 wasn't as if he was focused on the territory of New
2 England but lived in Seattle or something; it's not a
3 situation like that.

4 So I really recognize, you know, why you would
5 say why the Washington statute doesn't apply and I
6 should consider the choice-of-law provision, but let's
7 just say it's out of the picture, then it doesn't look
8 too good for purposeful availment.

9 MR. CUNNINGHAM: Well, your Honor, with all due
10 respect first, even if the Washington statute would
11 apply, it does not void out the choice-of-law
12 provision; it only voids out the personal jurisdiction
13 venue provision. So the choice of law, Rhode Island
14 law, would still apply to the agreement. The
15 Washington statute does not --

16 THE COURT: I understand that, but you were
17 arguing that the choice-of-law provision should be
18 considered for purposes of evaluating personal
19 jurisdiction. So not just applying the choice of law,
20 but that it should be given weight for purposes of
21 examining personal jurisdiction. And that strikes me
22 as perhaps violating the Washington statute.

23 MR. CUNNINGHAM: I guess I'll just respectfully
24 disagree on that, your Honor. I don't think it
25 violates the Washington statute at all. And what I was

1 really saying was that the First Circuit recognizes
2 that the parties' choice of law is indicative of the
3 fact that someone has purposefully availed themselves
4 of that state. That's really the point there.

5 But, your Honor, it's also much more than that.
6 We have to go back in time. The Washington statute
7 came into effect in 2020. The question here is
8 personal jurisdiction and whether it was reasonably
9 foreseeable that the defendant would have to engage in
10 litigation in Rhode Island. And I think we have to
11 look at that at the time the agreement was entered into
12 back in 2019 when there was no Washington statute.

13 If we look at the situation there, you know,
14 these are the basic facts. CVS purchased Aetna. CVS
15 offered to Mr. Brown -- and he knew CVS had purchased
16 Aetna; that was no surprise to anyone. CVS made an
17 offer to Mr. Brown which is would you -- here is an
18 equity grant, an ownership interest in a Rhode Island
19 company as a principal place of business in Rhode
20 Island, that has a subsidiary called Aetna now that
21 you'll be performing services for. Do you want the
22 equity? If so, you have to agree to the provisions in
23 the restrictive covenant agreement which include Rhode
24 Island choice of law, and it included an agreement that
25 if he had a claim against CVS -- and by the way, this

1 stays in effect regardless of the Washington statute
2 which only applied to noncompete agreements -- but if
3 he has, like I said, a wage claim, your Honor, you
4 would have to bring a wage claim in Rhode Island.

5 So he knew that. He agreed to that. That's
6 foreseeable that he would be hailed into court in Rhode
7 Island. That's why I say I think from purposeful
8 availment, was it foreseeable that he might be required
9 to defend himself in Rhode Island? Of course it was.
10 And he agreed to that.

11 The fact that he lives in Washington, his region
12 was eight states, your Honor. It was all of the
13 Pacific Northwest and Mountain Region. It was eight
14 states. He happened to live in Washington, but his
15 area of coverage was much broader than Washington. So
16 I guess that's a rhetorical question. Do we have to
17 sue him in Oregon or Nevada because he had
18 responsibility for those?

19 You know, there should be some certainty for
20 CVS. That's what they bargained for, that's what they
21 received, that's what Mr. Brown agreed to. I think
22 from a personal jurisdiction standpoint, it's
23 absolutely foreseeable that he would have to defend
24 himself in Rhode Island.

25 THE COURT: Okay. Well, thank you,

1 Mr. Cunningham. Let me give Mr. McDougald a shot at
2 this.

3 MR. CUNNINGHAM: Thank you.

4 MR. McDOUGALD: Thank you, your Honor.

5 I have the good news of not going to require a
6 lot of genuflecting to get to the point. The
7 Washington statute is unequivocal. And we have argued
8 that, again, employers, if you're employing people in
9 the State of Washington, this statute applies to you.
10 All the dancing and arguments you heard from counsel
11 are made to the legislature.

12 And again, your Honor, why did this happen? It
13 happened because Washington, like many states in
14 multiple industries, has a lot of employees based in
15 Washington who have employers who are foreign
16 corporations, not just foreign states, but also
17 international. And the legislature made the decision
18 that those folks were not going to be required to have
19 disputes with their employers done in Asia, done in
20 other states, and any employer who came in had notice
21 of that. And the statute is very clear; it said any
22 claim filed after January 1, 2020, any claim.

23 There is no question that the statute is there.
24 There is no question that Mr. Brown is a Washington
25 resident. We've had this unusual comment on we think

1 he may not be a Washington resident, your Honor. In a
2 word, that's incorrect. He lives in West Seattle, your
3 Honor. When his son was going to Arizona State
4 University, he bought a condo in Arizona for his son to
5 live in because it was actually cheaper than putting
6 him in the dorms. They've kept it; they use it as a
7 vacation home. And when they decided to sell their
8 West Seattle home, they used that address for their
9 mailings for a short period.

10 The reason he's moving from West Seattle, as
11 your Honor may know, there's one bridge from West
12 Seattle into downtown Seattle making it a ten-minute
13 trip. That bridge was condemned federally two years
14 ago and won't be rebuilt for about another three years.
15 Most folks in West Seattle are moving south for cheaper
16 homes and the fact that they don't want to have to
17 drive an hour to get off their little peninsula.

18 This was not Mr. Brown trying to fool the Court.
19 He's lived in Washington. One of his oldest children
20 lives in Washington as well. His family's here. He's
21 always been a Washington resident. He is not an
22 Arizona resident. Period, end of story on that issue.

23 Personal jurisdiction. Your Honor, you had
24 pointed out correctly he made one trip to Rhode Island.
25 He worked for Aetna, a subsidiary of CVS. He did not

1 purposely avail himself of the benefits of being a
2 Rhode Island citizen. Nothing he's done has indicated
3 he expected and participated and has the kind of
4 minimum contacts we typically ask for in a circumstance
5 of personal jurisdiction.

6 Nothing presented today indicates that venue in
7 a state where he doesn't live is appropriate in this
8 case based on the actual evidence, based upon the
9 statute in Washington and based on their contract.
10 You'll recall, your Honor, when you were kind enough to
11 give us a little time early on, we were told venue was
12 appropriate because of the contract. Like the Court, I
13 read the contract. The contract says at paragraph 19,
14 if you sue CVS, you'll agree you'll sue them in Rhode
15 Island.

16 I know this isn't lost on the Court. Mr. Brown
17 is being sued; he has not made a claim against CVS.
18 And of course, I would argue that even if he wanted to,
19 that would have to be in Washington. But again, their
20 own contract, which they prepared, created venue in
21 Rhode Island under one circumstance, and that
22 circumstance, your Honor, doesn't exist here. And
23 moreover, it's inconsistent with Washington law.

24 THE COURT: So let's just break it down so I
25 make sure I understand your position. Your position

1 would be that the contract itself requires only
2 adjudication of the case in Rhode Island if Mr. Brown
3 was suing the company. And that provision of the
4 contract interpreted in that fashion would be
5 unenforceable, in any event, under this provision of
6 Washington -- of the new Washington statute because it
7 explicitly says that any provision that requires
8 adjudication in a state other than Washington is
9 unenforceable.

10 MR. McDOUGALD: Right.

11 THE COURT: Otherwise, plaintiff would say that
12 none of it even applies because of the equity issue. I
13 want you to get to that.

14 But if that's all correct, then basically it's
15 all kind of a wash, and all that's left in the contract
16 is the first sentence of that provision which says that
17 the law of Rhode Island would govern. And I don't hear
18 you saying that this provision of the Washington
19 statute would make that provision unenforceable; is
20 that correct?

21 MR. McDOUGALD: Your Honor, I would argue that
22 that is potentially unenforceable as well. Because
23 under the Washington statute, they want courts in
24 Washington to review the issue under Washington law as
25 well as the contract. I have indicated before, I'm not

1 confident any portion of this particular agreement will
2 be enforceable, but I would argue that Washington
3 statute would say applying a choice of law for a
4 Washington resident, requiring them to have to accept
5 Rhode Island law as well as Rhode Island venue in that
6 contract, would potentially be unenforceable under the
7 statute. But I would also argue that that's a review
8 that would have to be done by a Washington court.

9 THE COURT: Okay. All right. So if this case
10 were transferred, it would be a Washington court using
11 Washington -- this is almost like a law school exam.
12 Washington choice-of-law principles, then deciding
13 whether Rhode Island law applies or Washington law
14 applies to the interpretation of this noncompete.
15 That's your position?

16 MR. McDOUGALD: It is, your Honor.

17 THE COURT: Now, what do you say to their
18 argument that the statute doesn't apply at all because
19 of the provision that excludes equity purchases?

20 MR. McDOUGALD: Yes. Your Honor, it is a
21 creative argument, but what that exclusion exception
22 had to do with was people who were selling businesses
23 between one another and agreeing to either arbitrate or
24 litigate outside the state in connection with the sale
25 of business.

1 Remember, this statute came up with respect to
2 people who were employed by primarily technology
3 companies who got compensation in part as stock in
4 equity provisions. The legislature did not say, by the
5 way, you can claim this was not in the statute. You
6 can claim that this exception applies to you because
7 you're fighting over a stock option or restricted
8 stock.

9 It simply wasn't part of the statute and that is
10 not -- if that were the purpose, it would mean that
11 most of us who would work with a publicly traded or
12 stock company would always be able to be pulled up by
13 the state. That's exactly inconsistent with the
14 statute. Again, a creative argument, but inconsistent
15 with the language of the statute. And that particular
16 exception is simply not there.

17 THE COURT: Okay. So circle back then to the
18 whole personal jurisdictional argument. You heard what
19 Mr. Cunningham had to say with respect to the factors
20 in a particularly purposeful availment.

21 MR. McDOUGALD: In this particular case, your
22 Honor, when we go through the factors, first, we ask
23 ourselves, what really occurred? Mr. Brown worked for
24 Aetna. Aetna gets acquired after he's employed by CVS.
25 Aetna isn't trying to enforce an agreement with him or

1 trying to pull him to, by the way, where they're
2 incorporated which is Connecticut. Their parent
3 company is arguing that by virtue of accepting his
4 compensation, he knew he would be dragged and could be
5 dragged to Rhode Island. And the only indicia of that
6 that they argue is their contract, which we've talked
7 about the provisions.

8 What about that said he understood the burden?
9 The answer is nothing. When we go to the facts of his
10 compensation, he has two pieces to it; he has his basic
11 compensation, he has a bonus and incentive plan. He
12 had that with Aetna. The only difference was when CVS
13 became the parent, they said you're getting CVS as
14 opposed to an equity grant because Aetna doesn't exist
15 anymore; it's now owned by CVS.

16 Nothing about that transaction told him he was
17 going to have minimum contacts with Rhode Island, that
18 he was going to avail himself of the benefits of Rhode
19 Island, that he would do business in Rhode Island. And
20 your Honor, as you've pointed out, all of his work was
21 based in Seattle for the Western region.

22 THE COURT: Let me press back on you a little
23 bit on that point because, you know, as Mr. Cunningham
24 said, I mean, this isn't an unsophisticated person
25 you're dealing with. You're talking here about a

1 sophisticated business person. I think we can assume
2 that he's someone who reads contracts before he signs
3 them, contracts that he is entering into, so presumably
4 he read this contract. The contract states flatly that
5 you are subject to the laws of Rhode Island and if you
6 have a dispute with the company, you have to bring it
7 in Rhode Island. And he's given his stock option bonus
8 and told explicitly that if you accept this, you're
9 accepting the terms of this agreement.

10 So by doing that, he's doing something very
11 conscious and very clear that says I understand that
12 Rhode Island is where I am. I'm hitching my trailer
13 here in Rhode Island when he did that. It's not like
14 something he might have missed or something that
15 happened that he didn't think about. And then you add
16 on top of that that, you know, he knows it's a Rhode
17 Island corporation. He accepts his paychecks from a
18 Rhode Island corporation. And then he comes here to do
19 the training session. So why isn't that enough?

20 MR. McDOUGALD: I would say again, your Honor, I
21 don't think it meets the standard, but let's assume he
22 reads it thoroughly not just as a business person, but
23 as a lawyer. If you read paragraph 19, it would tell
24 him, if I bring a claim, I am going to have to bring it
25 to Rhode Island. It does not tell him if my employer

1 sues me, I'm going to Rhode Island. So no matter what,
2 however he read it, he's not saying I'm in Rhode Island
3 no matter what. I'm only coming if I want to make a
4 claim if that is my requirement. It doesn't tell him
5 he's subject to being pulled to Rhode Island for any
6 and all claims against him by CVS or anyone else by
7 their own contract language. So he never gets that
8 notice and never agrees to it.

9 THE COURT: I suppose you could say implicit in
10 the wording there is that -- it says if I sue CVS, I
11 have to do it in Rhode Island, but, implicitly, I guess
12 if I get sued by CVS, it could be anywhere. Rhode
13 Island --

14 MR. McDOUGALD: Where I live, where I work,
15 right.

16 THE COURT: Okay. But it doesn't explicitly say
17 it will be in his home court. It could be either one.

18 MR. McDOUGALD: With the exception of, again, in
19 this particular case, there is no question that CVS
20 prepared the agreement and, as a result, they were in
21 the position to know what they wanted.

22 And I would suggest, your Honor, that that
23 limitation was not put there for the benefit of
24 employees; it was put there because CVS recognized you
25 can't pull everyone here when you want to sue them. We

1 understand that, but if you want to sue us, we're going
2 to pull you here. And that's why we have this very
3 specific language for a multibillion-dollar company
4 with, as you can tell by Mr. Cunningham, they're able
5 to hire good legal talent.

6 THE COURT: Okay. All right. Thank you.

7 Mr. Cunningham, do you want to respond?

8 MR. CUNNINGHAM: Just on a couple of points,
9 your Honor.

10 First, we need to recognize that this was a
11 substantial transaction between CVS and Mr. Brown. The
12 value of those restricted stock units in CVS was nearly
13 \$100,000 with a CVS company stock in a Rhode Island
14 company. The fact that there isn't an exclusive venue
15 provision in there, it doesn't have to be an exclusive
16 venue provision in order for there to be personal
17 jurisdiction. The question is whether or not the
18 purposeful availment, it's foreseeable that he could
19 have to litigate a case in Rhode Island.

20 And I believe the law backs this up, your Honor.
21 If you enter into an agreement with a company that is
22 domiciled in Rhode Island, that has a principal place
23 of business in Rhode Island, if you go to visit them
24 for leadership training in Rhode Island, if you accept
25 a hundred-thousand dollars worth of their stock in

1 Rhode Island, and you understand that because on the
2 cover page to the agreement it says as a condition of
3 accepting your 2019 equity award, you are required to
4 review and electronically sign this agreement and, by
5 the way, it says, if you have any questions, call human
6 resources.

7 THE COURT: The characterization of the question
8 I think you were making is a bit of an
9 oversimplification. And I'd just read to you from what
10 the case law says. And I agree, it's voluntary and
11 foreseeable, but the First Circuit has said it's akin
12 to a rough quid pro quo; that is, when a defendant
13 deliberately targets its behavior toward the society or
14 the economy of a particular forum, the forum should
15 have the power to subject the defendant to judgment
16 regarding his behavior.

17 And as I said in a prior -- well, maybe it
18 wasn't me, another judge before my time on the
19 court -- it's a decision by the defendant to inject
20 himself into the local market. So I agree with you
21 that the circuit has talked about in *Astro-Med* the
22 voluntary nature and the foreseeability, but there has
23 to be some kind of a deliberate or a conscious
24 initiative on the part of the defendant, it seems to
25 me, to inject himself into the economy.

1 Now, what you've got here is the acceptance of
2 money, both the equity payment and the paychecks, I
3 grant you that, but that money's coming from Rhode
4 Island. So I'm not sure that qualifies as Mr. Brown
5 injecting himself into the economy of Rhode Island.
6 You have him coming to Rhode Island on that one
7 occasion. I think that, I would agree with you, is
8 injecting himself into the market or the economy of
9 Rhode Island. He's in the state, he's physically in
10 the state when he's here doing that, but his work, the
11 actual work he's doing, is not injecting itself into
12 the Rhode Island economy.

13 So it's a pretty thin read. I mean, I agree
14 with you; it's foreseeable that sitting out there in
15 Seattle, Mr. Brown might say, well, now -- after CVS
16 acquires Aetna, he says, well, if I ever get sued by
17 CVS, they'll probably sue me in Rhode Island. I can
18 grant you that much. But I'm not sure where I see the
19 sort of purposeful injection of him into the economy of
20 the state.

21 MR. CUNNINGHAM: I think that's where the equity
22 grant comes into play, your Honor. He accepted a
23 hundred-thousand dollars worth of equity in a company
24 that's domiciled in Rhode Island and as a principal
25 place of business in Rhode Island. I think that

1 injects you into that economy. It wasn't Aetna any
2 longer. And everyone knew it wasn't Aetna any longer.
3 That transaction took place back in 2018. So he
4 agreed --

5 THE COURT: Okay. So you're saying now that he
6 is a stock owner of a Rhode Island corporation, he's
7 become part of the economy of Rhode Island.

8 MR. CUNNINGHAM: Correct, your Honor.

9 MR. McDOUGALD: Your Honor, that's an argument
10 that will put us all subject to personal jurisdiction
11 wherever we own stock.

12 THE COURT: That's an extension of personal
13 jurisdiction. That's, you know, a serious question.
14 Do you know of any case that holds that ownership of
15 stock or accepting a stock option in a company by
16 itself creates personal jurisdiction in that court, the
17 court wherever that company is located?

18 MR. CUNNINGHAM: I'm not. To be sure, we'll
19 look, your Honor. But I don't think those are the
20 circumstances here. This wasn't a day trader
21 purchasing stock of a Cayman Islands company or a Texas
22 company. This was somebody whose company, Aetna, was
23 acquired by CVS, and he was being offered stock in that
24 new company in his ultimate employer because it's the
25 holding company of Aetna. He knew that, and he agreed

1 to enter into that transaction and to enter into the
2 contract with CVS and agree that Rhode Island law would
3 apply to that contract.

4 That's much different than purchasing some
5 stock, you know, in some random company that you have
6 no other connection to. I think it's completely
7 different.

8 THE COURT: Okay. All right. Well, I thank you
9 both for your arguments. I'm going to try to get you a
10 decision quickly on this jurisdictional issue so that
11 we can, you know, march forward one way or the other.

12 MR. McDOUGALD: Understood, your Honor.

13 MR. CUNNINGHAM: Your Honor, I have to ask,
14 because we are here on a TR0 proceeding today, you
15 know, we will be very concerned if we're leaving this
16 hearing today without some kind of assurance that in
17 the interim Mr. Brown isn't going to run to Cigna and
18 start working there this evening.

19 THE COURT: Well, it's a good question. I'm
20 reluctant to give you any kind of an order if I haven't
21 decided whether I have personal jurisdiction or not.
22 And that's my hesitation. But it's a good question for
23 Mr. McDougald.

24 MR. McDOUGALD: No. They have offered some, in
25 our discussions, some limited ability for Mr. Brown to

1 work. And I think at least in the interim that would
2 be a start. But it would have limits. But I think the
3 things we've been talking about will be sufficient so
4 he's not going to go beyond what we've talked about.
5 And I will get Mr. Cunningham's agreement before he
6 walks in -- I guess, virtually walks into the office
7 door. But I would expect him to be able to do that in
8 the next day or two.

9 Mr. Cunningham, my goal would be to let him do
10 the things we've talked about and not do the things
11 you're most concerned about. If we don't come to an
12 agreement, then he won't do it, but my expectation is I
13 think we had four categories we agreed on, two we had
14 not. I think we could be able to agree to those four
15 categories to start and then wait for the Court's order
16 and take the next step.

17 MR. CUNNINGHAM: Okay. I'm not sure that we
18 agreed on four, but I'm happy to discuss this. What I
19 heard is if we can't come to an agreement, at least in
20 this very short time period, Mr. Brown wouldn't do
21 something we haven't agreed to. So that works for now
22 so I appreciate it.

23 MR. McDOUGALD: Okay.

24 THE COURT: Okay. Good. All right.

25 Well, thanks very much. We'll let you go, and

1 you'll hear from me soon.

2 MR. CUNNINGHAM: Thank you very much, your
3 Honor.

4 MR. McDOUGALD: Thank you.

5 THE COURT: Thank you.

6 (Time noted; 3:59 p.m.)

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1 I, Lisa Schwam, CRR-RPR-RMR, do hereby
2 certify that the foregoing transcript is a correct
3 transcript *of a remote video conference* prepared to the
4 best of my skill, knowledge and ability of the
5 proceedings in the above-entitled matter.

6
7 /S/ Lisa Schwam

8 Lisa Schwam, CRR-RPR-RMR
9 Federal Official Reporter

Date:
March 8, 2021

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